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No. 10-278

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IN THE

Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED, *ET AL.*,

Petitioners,

v.

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Circuit erred by upholding as constitutional Virginia's ban against advertising alcohol in college newspapers, where a majority of the newspapers' readership consists of adults over twenty-one years of age, in direct conflict with the Third Circuit's decision striking down nearly identical restrictions in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 States, including Virginia.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared before this and numerous other state and federal courts to promote the First Amendment rights of the business community. While WLF believes that government has an appropriate role to play in ensuring that commercial speakers do not provide false or misleading information to consumers, WLF has consistently opposed government efforts to censor or otherwise prevent consumers from hearing truthful speech. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

WLF supports each of the arguments made by Petitioners, but writes separately to emphasize that the Fourth Circuit's treatment of the third prong of *Central Hudson* in this case was so watered down and deferential to the government that it rendered that

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored this brief in whole or in part; and that no entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the filing deadline, WLF's counsel provided counsel for Petitioners and Respondents with notice of intent to file.

prong essentially meaningless. If the Fourth Circuit's decision stands, state governments can simply assert a theoretical link in commercial speech cases between a restriction on advertising and the State's purported interest with no actual evidence, appeal to the "common sense" of the court, and effectively shift the burden to the speaker to produce specific data to contradict this theoretical and speculative link. Such an approach would mark a fundamental shift away from this Court's precedent and severely weaken the protections afforded to commercial speech by the First Amendment. Accordingly, this Court should grant the petition for a writ of certiorari to clarify the proper application of the third prong of the *Central Hudson* test and to resolve a split of authority between the Third and Fourth Circuits.

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to further the public's interest in preserving the important commercial speech protections afforded by the First Amendment. All parties have consented to the filing of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

This case raises important questions regarding the State's burden to prove that a restriction on commercial speech directly and materially advances the State's interest under the third prong of the test for restrictions on commercial speech established by this Court in *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The decision below, if allowed to stand, will significantly weaken the protections the First Amendment affords to all forms of

commercial speech.

The Virginia Department of Alcohol and Beverage Control ("ABC Department") is responsible for regulating the sale and distribution of alcoholic beverages in the Commonwealth of Virginia. Pet. App. 12a. The Alcoholic Beverage Control Board ("ABC Board") promulgates regulations regarding the sale and distribution of alcoholic beverages. *Id*; Va. Code § 4.1-111. The ABC Board enacted 3 VAC 5-20-40 (B)(3) (the "alcohol advertising ban"), which essentially prohibits the advertising of alcohol brands in all college publications. It provides in relevant part:

> Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below.
>
> . . . .
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words . . .

Id. at 2a-3a. The Commonwealth of Virginia claims that the alcohol advertising ban seeks to further the State's interest in reducing underage and over-consumption of alcohol on college campuses. *Id.* at 29a (citing Defs'. Mem. Supp. Summ. J. 19-20).

Petitioner Educational Media Company at Virginia Tech, Inc. is a non-profit corporation that owns

The Collegiate Times, a student-run newspaper at the Virginia Polytechnic Institute and State University. Pet. App. 5a. Petitioner The Cavalier Daily, Inc. is a non-profit corporation that owns *The Cavalier Daily*, a student-run newspaper at the University of Virginia. *Id.* at 5a. *The Collegiate Times* and *The Cavalier Daily* are distributed free of charge on college campuses and in surrounding communities. *Id.* at 5a; 9a. The majority of readers of *The Collegiate Times* and *The Cavalier Daily* are twenty-one years of age or older, and therefore may legally purchase alcoholic beverages.[2] *See id.* at 6a; 10a. The newspapers' annual budgets consist almost entirely of advertising revenue. *Id.* at 5a; 9a.

Because of the Commonwealth's alcohol advertising ban, Petitioners have had to turn away potential revenue from businesses who wished to advertise alcoholic beverages. *Id.* at 7a-8a;10a-11a. These same businesses are able to advertise in competing, non-student publications. *Id.* Petitioners each estimate a loss of approximately $30,000 per year as a result of the prohibition on alcohol advertising. *Id.*

Petitioners challenged the alcohol advertising ban as unconstitutional, both on its face and as-applied. Ruling on the cross-motions for summary judgment, the district court found the regulation to be facially unconstitutional under *Central Hudson* because it fails to directly and materially advance a substantial governmental interest. *Id.* at 24a. The district court's

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[2] Although both newspapers have significant readership over the age of twenty-one, the ABC Board considers both *The Collegiate Times* and *The Cavalier Daily* to be "college student publications" that are subject to advertising restrictions of 3 VAC 5-20-40 (B)(3). Pet. App. 6a; 10a.

analysis began by placing the burden of proof on the Commonwealth to demonstrate that the regulation directly advances the governmental interest asserted. *Id.* at 21a. Respondents attempted to satisfy their burden by urging the court to inject a subjective overlay into the reasonableness test, whereby reasonableness is evaluated based on a subjective belief that the regulation directly advances the governmental interest—an argument the court rejected. *See Id.* at 30a-34a.

In evaluating the Commonwealth's interest, the district court relied on the Third Circuit's decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), in which then Judge Alito invalidated a Pennsylvania statute banning advertisers from paying for alcohol advertising by communications media affiliated with an "educational institution." *Id.* at 33a-34a. *Pitt News* held that the State failed to adequately prove "a material degree" of advancement because, even if college students did not view the alcohol advertisement in a student publication, they will be exposed to alcoholic beverage advertisements in other mediums, including other free newspapers handed out on campus. *Id.* The district court noted that Respondents presented no record evidence that the ABC Board considered findings by expert researchers when enacting the alcohol advertising ban. *Id.* at 34a. Rather, the court concluded that "the Board could not have [considered such expert findings] because all the data before the court post-dates the regulation's enactment." *Id.* The district court thus held that Respondents' belated studies could not justify an earlier restriction on protected commercial speech since "[t]his *post hoc* presentation of the record does not explain the conduct of the regulatory board when considering its action,

which is a traditional anchor on which the reasonableness evaluation rests." *Id.*

Respondents appealed. In a divided opinion, the Fourth Circuit reversed, holding that Virginia's advertising ban satisfies the four-pronged *Central Hudson* test. *See id.* at 80a. While both the majority and dissent agreed that the first two prongs of the *Central Hudson* test were satisfied, the opinions differed significantly with respect to the third and fourth prongs. As for the third prong's requirement that the regulation directly advances the State's interest, the majority opinion relied solely on "history, consensus, and common sense" to find a link between advertising bans in college newspapers and a decrease in demand for alcohol among college students. *Id.* at 76a-77a. In addition, the majority imposed on the college newspapers the burden of "*specifically* contradict[ing] this link." *Id.* at 77a-78a (emphasis in original). Addressing the fourth prong of *Central Hudson*, the majority found that the Commonwealth's alcohol advertising ban, as part of an overall scheme to combat underage drinking, was narrowly tailored to serve the Commonwealth's asserted interest. To support this conclusion, the majority relied on the fact that only certain types of alcohol advertisements were prohibited and that the restriction applies only to "college student publications." *Id.* at 78a-79a.

In dissent, Judge Moon stated that he would have affirmed the district court's ruling. Citing this Court's thirty-year precedent establishing a significant burden on the State to prove that the regulation directly advances the State's interest, he observed that here, as in *Pitt News*, the "Commonwealth relies on nothing more than speculation and conjecture." *Id.* at 84a-85a.

Judge Moon also dissented with respect to the majority's finding that the regulation was narrowly tailored to meet Virginia's goal of curbing underage drinking. Finding a poor fit between the regulation and Virginia's asserted goal, Judge Moon reasoned that it was inconsistent for the Commonwealth to permit an advertisement for "beer night" at a dining establishment merely because the regulation forbids advertising specific brand names. *Id.* at 86a-88a. Relying again on *Pitt News*, Judge Moon found the regulation to be "severely over-and-under inclusive" since the majority of the readership of these newspapers is of legal age to drink. *Id.* at 89a. While recognizing that the regulation need not be "the single best disposition," Judge Moon nonetheless found that the advertising ban here offers "only ineffective or remote support," not a direct means, to combat underage and abusive drinking. *Id.* at 89a-90a.

The Fourth Circuit subsequently denied Petitioners' motion for rehearing *en banc*. *Id.* at 93a.

REASONS FOR GRANTING THE PETITION

Alcohol distributors "have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information" about those products. *See Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525, 564 (2001). The decision below incorrectly prohibits adult readers over the age of twenty-one–who comprise the majority of readers of the *Collegiate Times* and *The Cavalier Daily*–from receiving such information. Pet. App. 43a. Thus, the decision below incorrectly and contrary to this Court's precedent permits the

Commonwealth of Virginia to "reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977).

The petition should be granted for several reasons. First, the decision below directly conflicts with the Third Circuit's decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004). Considering a substantially similar commercial speech restriction on alcohol advertising in college newspapers, *Pitt News* applied the third prong of Central Hudson in a significantly different manner than the Fourth Circuit did in this case, yielding a conflicting and contrary result. Accordingly, this Court should grant the petition for certiorari to resolve the split between the Third and Fourth Circuits.

The Fourth Circuit's analysis below also significantly waters down the third prong of the *Central Hudson* test in significant ways. By ignoring record evidence presented by both parties, the appeals court panel chose instead to rely entirely on its own "common sense" analysis. Such an analysis, relieved of any grounding in hard evidence, is necessarily subjective and is contrary to this Court's established precedent.

Further, the Fourth Circuit's analysis completely ignores the issue of materiality. This failure directly contradicts a long line of authorities from this Court holding that a restriction on commercial speech must directly advance a State's interests "*to a material degree.*" *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173 (1999) (emphasis added). As

this Court has repeatedly warned, without this crucial safeguard, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* at 188 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993))).

Finally, the Fourth Circuit's analysis improperly held that, in the case of a facial challenge, the burden shifts to the *speaker* to *disprove* the theoretical link between a restriction on advertising in one narrow media segment and a reduction in demand, as asserted by the Commonwealth. But this Court has long held that mere assertion of a link between advertising and demand is insufficient to satisfy the third prong of *Central Hudson* without proof that the restriction at issue in fact *directly* and *materially* reduces demand. Given that a theoretical link between advertising and material changes in demand, no matter how tenuous, is used to justify nearly all restrictions on commercial speech, the appeals court's unquestioned acceptance of this linkage significantly undermines the protections afforded by *Central Hudson*.

Accordingly, this Court should grant the petition for writ of certiorari to provide lower courts with guidance on the proper application of the third prong of the *Central Hudson* test.

I. REVIEW IS WARRANTED TO RESOLVE AN IRRECONCILABLE SPLIT IN AUTHORITY BETWEEN THE THIRD AND FOURTH CIRCUITS

This case involves a First Amendment challenge to the Commonwealth of Virginia's ban on certain alcohol advertisements in all college student publications. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), involved a First Amendment challenge to Pennsylvania's ban on alcohol advertising in college student publications. In both cases, the majority of the readers of the publications were twenty-one years of age or older. Likewise, in both cases, the government claimed to have a substantial interest in combating underage drinking and alcohol abuse by college students, which interest was materially advanced by the advertising ban. Although both courts applied the *Central Hudson* four-part test, the similarities in these two cases end there. In *Pitt News*, the Third Circuit struck down the advertising restriction under *Central Hudson*. But here the Fourth Circuit upheld Virginia's advertising restriction under *Central Hudson*. Despite the factual similarities, the applications of the *Central Hudson* test by the Third and Fourth Circuits are markedly different.

Both the Third and Fourth Circuit opinions cite *Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525 (2001), to articulate the requirements of the third prong of the *Central Hudson* test. As stated in *Lorillard*, the third prong

> requires that the speech restriction directly and materially advance the asserted governmental interest. This burden is not satisfied by mere

> speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and that its restriction will in fact alleviate them to a material degree.* We do not, however, require that empirical data come . . . accompanied by a surefeit of background information . . . . We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions *based solely on history, consensus, and simple common sense.*

Lorillard, 533 U.S. at 555 (citations and internal quotation marks omitted) (emphasis added). The Third Circuit's analysis of the third prong of *Central Hudson* properly focused on whether the speech restriction would "alleviat[e] the cited harm to a material degree." *Pitt News*, 379 F.3d at 107. In finding that the alcohol advertising ban did not satisfy this prong, the Third Circuit did not dispute that, generally speaking, alcohol advertisements encourage consumption. *Id.* But because the government provided no evidence whatsoever that applying the ban to only those media directed at educational institutions would greatly reduce the quantity of alcohol ads viewed by underage students, the Third Circuit found that the third prong was not satisfied. *Id.* The court recognized that, even if *The Pitt News* did not contain alcohol ads, students "will still be exposed to a torrent of beer ads on television and the radio, and . . . in other publications." *Id.* According to the court, "[c]ommon sense suggests that would-be drinkers will have no difficulty finding those [places near campus where alcohol may be purchased] despite

[the advertising ban], and the Commonwealth has not pointed to any contrary evidence." *Id.*

The majority opinion in this case, however, applied the third prong of the *Central Hudson* test much differently. In its analysis, which from the outset was deferential to the Commonwealth, the appeals court evaluated the government's ability to justify its ban not by considering and weighing the empirical evidence, as required, but rather by consulting "history, consensus, and simple common sense."[3] Pet. App. 76a. The appeals court panel found that the generic correlation between advertising and demand, coupled with the fact that college publications specifically target college students, was enough to establish a common sense link between the advertising restrictions at issue and the Commonwealth's interest in decreasing demand for alcohol by college students. *Id.* at 77a. Unlike the Third Circuit in *Pitt News*, the Fourth Circuit majority failed entirely to address whether the government had met its burden to show that the advertising restriction would alleviate by a "material degree" the harms the

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[3] The appeals court derived its reliance on "history, consensus, and simple common sense" from *Burson v. Freeman*, 504 U.S. 191, 211 (1992), a First Amendment case involving non-commercial speech in which this Court upheld a "campaign-free zone" within 100 feet of a polling place. *Id.* at 193. Following an extensive review of the history of election regulations, which found a dearth of empirical evidence on the effects of century-old voting regulations, this Court held that the state was not required to proffer empirical data to prove that a 100-foot boundary was narrowly tailored to prevent voter intimidation and election fraud. *Id.* at 208-09. Thus, the Fourth Circuit evidently relied on a case where empirical data was not available as the primary basis for its analysis in this case where data and specific findings were readily available.

government was purportedly trying to prevent. Indeed, the court held that because the *speakers* provided no evidence to specifically contradict the claimed theoretical link between advertising and demand, the alcohol advertising ban therefore satisfied the third prong of the *Central Hudson* test.

In sum, the Third and Fourth Circuit's drastically different approaches to the third prong of the *Central Hudson* test yield contradictory conclusions under strikingly similar facts. As such, a clear circuit split exists that needs to be resolved by this Court to afford proper guidance to the lower courts in future First Amendment cases applying the *Central Hudson* test for advertising restrictions on legal products.

II. REVIEW IS WARRANTED TO CLARIFY THE ROLE "COMMON SENSE" PLAYS IN SHIFTING THE BURDEN OF PROOF IN FACIAL CHALLENGES OF ADVERTISING RESTRICTIONS

Since this Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), commercial speech has been increasingly afforded greater First Amendment protection. Indeed, members of this Court have discussed eliminating all or part of the *Central Hudson* test in favor of a stricter level of scrutiny. *See, e.g, id.* at 518-20 (Thomas, J., concurring). The *Central Hudson* test remains in place, yet has been applied inconsistently and sometimes improperly by lower courts since *44 Liquormart*. In the instant case, the Fourth Circuit's analysis and application of the third prong of the *Central Hudson* test is so watered down as

to render that prong meaningless.[4]

Under the third prong of *Central Hudson*, the government bears the burden of proving that a restriction on commercial speech "directly advances the governmental interest asserted," *Cent. Hudson*, 447 U.S. at 566, and that it does so "to a material degree." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995). This prong is "critical" because, without it, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin*, 514 U.S. at 487 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). Thus, the government's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770-71. Indeed, it is insufficient that a restriction "provides only ineffective or remote support for the government's purposes," *id.* at 770, or if the restriction has "little chance" of advancing the state's

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[4] The Fourth Circuit's panel majority looked primarily to its own opinion in *WV Ass'n of Club Owners and Fraternal Servs, Inc. v. Musgrave*, 553 F.3d 292 (4th Cir. 2009) to analyze the legal issues in this case. This is troubling because *Musgrave* explicitly distinguished itself from "the *Central Hudson* line of cases." 553 F.3d at 301. In *Musgrave*, the regulated speech was a mixture of both government and private commercial speech. As such, according to the *Musgrave* court, "the state's interest is higher because the state has an ownership interest, not just a regulatory interest." *Id.* The court went on to say "[w]e continue to use *Central Hudson* as a guide, but . . . the government speech aspects . . . provide additional weight in favor of upholding the state's regulations that is simply not present in other commercial speech cases." *Id.* Thus, instead of relying on this Court's commercial speech precedent, the Fourth Circuit relied on its own idiosyncratic opinion, which took great pains to distinguish itself from the very test at issue.

goal. *Id.* The Fourth Circuit wholly ignored these considerations and instead applied its own water-downed version of this critical prong of the *Central Hudson* test.

A. The Fourth Circuit Mistakenly Held, Through Reliance on Mere "Common Sense," That a Theoretical Link Between Advertising and Demand Satisfied the Commonwealth's Burden to Show That the Restriction at Issue "Directly Advances" Its Interest "to a Material Degree"

The Fourth Circuit's analysis was flawed from the outset because of its over-reliance on "common sense" to find a link between Virginia's advertising restriction and the government's interest of reducing underage drinking among college students. The panel's majority opinion makes no mention, much less attempts a detailed analysis, of how the alcohol advertising ban will actually reduce underage drinking in a material way as required by this Court's First Amendment precedent. But "common sense," standing alone, cannot satisfy the State's burden because, as the Third Circuit correctly noted, common sense can just as easily lead to the opposite result, e.g., students will have no trouble finding those establishments where alcohol can be purchased even if alcohol advertising is prohibited in college publications. *Pitt News*, 379 F.3d at 107.

While courts can look to "common sense" when evaluating a restriction on constitutionally protected speech, this is not the entire analysis for deciding whether a restriction on commercial speech directly and materially advances the government's interest. This is

especially so where, as here, the government fails to provide evidence supporting its rationale for the restriction on advertising—in the face of evidence directly contradicting the government's purported rationale. Here, the district court, through a careful review of the evidence, determined that not a single witness testified as to how this regulation, which has been in effect for decades, has directly advanced the government's interest in preventing underage alcohol consumption or abusive drinking. Nor was there any evidence as to how the regulation has alleviated the problem or *any* effect the regulation has had in the past. *Id.* at 37a-38a. The Fourth Circuit did not quibble with these factual findings, but rather simply ignored them in favor of its own common sense view that a link existed between the advertising restriction and the government's interest in decreasing the demand for alcohol among college students.

A "common sense" link between a restriction on advertising and demand, however, does not alone provide the level of evidentiary support necessary to uphold a government restriction on advertising. For example, in *Greater New Orleans*, the government similarly relied on the bald assertion of a link between advertising for casino gambling and increased demand for such gambling. *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 189 (1999). The government argued further that the type of advertising at issue, broadcast advertising, was particularly dangerous to compulsive gamblers given its "pervasiveness and potency." *Id.* This Court rejected these assertions—as well as the limited evidence proffered to support them—as insufficient to meet the government's burden, noting that "[w]hile it is no doubt fair to assume that more advertising would have some impact on overall

demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another." *Id.* As a result, this Court concluded that "the Government fails to connect casino gambling and compulsive gambling with broadcast advertising for casinos . . . ." *Id.*; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (noting that common sense supported a conclusion that a prohibition on price advertising will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market, but nonetheless holding "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *Pitt News*, 379 F.3d at 107 (finding that the government's assertion that elimination of alcoholic beverage ads from student newspapers, but not from other media, will reduce demand by college students is "counterintuitive and unsupported by any evidence"); *compare Lorillard*, 533 U.S. at 556-61 (examining and relying upon numerous studies and other evidence presented by the government supporting a link between tobacco advertising and underage use of tobacco).

Even in the face of *some* supporting evidence, this Court has resisted the temptation to readily accept a theoretical link between a restriction on advertising and demand as sufficient to meet the government's burden to restrict commercial speech. By contrast, in this case, the Fourth Circuit required *no* evidence to determine whether the government had met its burden and, in fact, improperly placed the burden of proving otherwise on the Petitioners. The Fourth Circuit's approach thus flies in the face of established Supreme Court precedent.

Moreover, as noted by the dissent, the decision below entirely neglects the materiality aspect of *Central Hudson*'s third prong. This Court has repeatedly held that, to satisfy its burden, the government must show not only that a restriction "directly advances" its asserted interest, but also that it does so "to a material degree." *Rubin*, 514 U.S. at 487. For example, in *44 Liquormart*, the Court rejected a State's ban on price advertising in the absence of evidence that it had any significant effect on demand for alcoholic beverages. *44 Liquormart*, 517 U.S. at 505-06. Even accepting the government's theory that a ban on price advertising would decrease aggregate demand and thereby advance the government's interest, the Court held that the government failed to meet its burden because it had not presented any evidence that the decrease in demand would be significant. *See id.* at 506-07.

Similarly, in *Pitt News*, the Third Circuit rejected a regulation on alcohol advertisements in college student publications nearly identical to that challenged in this case, holding that the regulation did not combat underage or abusive drinking "to a material degree." *Pitt News*, 379 F.3d at 107. The Third Circuit noted that the regulation at issue "applies only to advertising in a very narrow sector of the media . . . , and that the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good." *Id.*

In stark contrast, the panel majority below failed to even consider the degree to which the challenged regulation would affect college drinking, let alone whether any effect would be material or significant. By relieving the government of its burden to prove that a

restriction advances its interests "to a material degree," the Fourth Circuit's decision gives wider latitude to regulators to restrict commercial speech even in the absence of proof of the effectiveness of the restriction. Review is thus warranted for this Court to clarify whether a government's unsupported assertion of a link between an advertising restriction and demand is sufficient to satisfy its burden of showing that a restriction "directly advances" its interest and does so "to a material degree."

B. The Fourth Circuit Erred by Improperly Shifting to Advertisers the Burden to Specifically Contradict the Claimed Link Between the Restriction and the Commonwealth's Stated Interest

In addition to relying merely on "common sense" and failing to analyze whether the restriction directly and materially advanced the government's interest, the Fourth Circuit went one step further in eradicating the third prong of *Central Hudson* by improperly shifting the burden of proof to the speakers to contradict the alleged link between the advertising restriction and the government's interest. The panel majority initiated this burden shift from the start of its opinion. Although stating that the *Central Hudson* test "applies to both facial and as-applied challenges," the appeals court then stated, without explanation or citation to any supporting case law, that the *type* of challenge to a provision—facial or as-applied—dictates the State's burden of proof. Pet.

App. 73a.[5] The Fourth Circuit then signaled that the weight of the government's burden under *Central Hudson* is lower in the case of a facial challenge than in the case of as-applied challenges. In support of this proposition, the panel cites *Penn Advertising*, a case that rests on the questionable precedent set by *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995). In *Penn Advertising*, the Fourth Circuit quoted *Anheuser-Busch* for the proposition that:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

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[5] In footnote 4 of its opinion, the Fourth Circuit also apparently attempts to distinguish the instant case from *Pitt News* by stating that *Pitt News* involved an as-applied challenge. We submit, however, that this is a distinction without a difference because the constitutional analysis, including the burden of proof set out in *Central Hudson*, does not change based on whether it is a facial or as-applied challenge. In a facial challenge, the burden remains on the government to demonstrate that at least *some* application of the statute could survive a First Amendment challenge under the *Central Hudson* test.

Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318, 1322-23 (4th Cir. 1995) (quoting *Anheuser-Busch*, 63 F.3d at 1311).

In its citation to *Penn Advertising*, the panel majority below cryptically notes that the case was "vacated on other grounds." Pet. App. 73a-74a. But in fact this Court specifically vacated and remanded[6] the case for further consideration in light of *44 Liquormart*, a case that seriously called into doubt precisely the portions of *Penn Advertising* and *Anheuser-Busch* that the Fourth Circuit purportedly relies on for its deferential application of the *Central Hudson* test. *See 44 Liquormart*, 517 U.S. at 508-14 (severely limiting legislative deference in applying the *Central Hudson* test).[7]

Setting aside the questionable *Penn Advertising* and *Ansheuser-Busch* decisions on which the Fourth Circuit relies, this Court's own recent precedent makes no distinction between facial and as-applied challenges in analyzing the weight of the government's burden under *Central Hudson*. Indeed, *44 Liquormart*, *Lorillard*, and even *Central Hudson* itself all involved facial challenges to restrictions on commercial speech, yet none of these cases even remotely suggests that the government bears a lighter burden of proof under

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[6] *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 518 U.S. 1030 (1996).

[7] These cases have also been largely overturned by *Lorillard*, in which this Court invalidated a regulation in Massachusetts that was substantially similar to the regulations at issue in *Penn Advertising* and *Anheuser-Busch*.

Central Hudson based on the fact that a facial challenge was at issue.

Despite the lack of precedent from this Court for shifting the burden to the speaker in facial challenges to restrictions on commercial speech, the Fourth Circuit nevertheless improperly held that "the college newspapers fail to provide evidence to *specifically* contradict" the link the court found between the restriction and demand for alcohol by college students. Pet. App. 77a-78a. Given that a theoretical link between advertising and demand is asserted by the government in nearly all advertising speech cases, the appeals court's approach is highly problematic. Shifting the burden to plaintiffs to *disprove* this link in such cases is a significant reversal of established case law and is likely to have a chilling effect on advertising and other commercial speech.

At bottom, the Fourth Circuit's opinion is completely devoid of any real analysis under the third prong of the *Central Hudson* test. By simply accepting the theoretical link asserted by the government based on mere "common sense," the Fourth Circuit in effect rendered this critical prong meaningless. If the Fourth Circuit's decision stands, the government in commercial speech cases can simply assert a theoretical link between a restriction on advertising and the government's interest with no actual evidence, appeal to the "common sense" of the court, and then immediately shift the burden to the speakers to produce specific data to contradict this theoretical and speculative link. This would mark a fundamental shift away from this Court's precedent and severely weaken the protections afforded by the First Amendment to commercial speech.

As such, this Court should grant the petition for certiorari to clarify the role of "common sense" in the third prong of the *Central Hudson* test, to clarify whether a government's unsupported assertion of a link between an advertising restriction and demand is sufficient to satisfy its burden of showing that a restriction "directly advances" its interest and does so "to a material degree," and to clarify whether the government must carry the same burden of proof under *Central Hudson* in both facial and as-applied challenges to restrictions on commercial speech.

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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